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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 253

PHIL WHITUS and LEON DAVIS,
Petitioners,

v.

THE STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

The Opinion of the Court of Appeals of Georgia is reported at 112 Ga. App. 328, 145 S.E. 2d 83 (1965).

Jurisdiction

The judgment of the Court of Appeals of Georgia was entered on September 8, 1965. Rehearing was denied on September 22, 1965. The Supreme Court of Georgia denied timely applications for writs of certiorari on November 9, 1965, motion for reconsideration in the case of Phil Whitus on November 16, 1965 and motion for reconsideration in the case of Leon Davis on November 29, 1965. The juris-

diction of this Court is invoked under 28 U.S.C., Section 1257(3), petitioners having asserted below and asserting here the deprivation of their rights, privileges and immunities claimed under the Constitution of the United States, and since the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

Questions Presented

1) Whether a Negro criminal defendant can be indicted conformably with the Constitution of the United States when State law requires the jury commissioners of a county to select the names of prospective grand jurors from the county tax receiver's tax digest, and the state law requires the tax receiver to maintain his tax digest on a racially segregated basis; and as subsidiary questions thereto, whether the mechanics of selection of grand jurors required by state law make discrimination probable, and whether a grand jury selected under such requirements of state law would be unconstitutionally composed; and

2) Whether Sections 59-106 and 92-6307, of the Code of Georgia, when construed together are repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and

3) Whether a Negro criminal defendant can be constitutionally indicted by a grand jury selected from a grand jury list which was made up, with reference to a pre-existing grand jury list admitted to have been unconstitutionally composed, of names selected pursuant to state law from a tax digest maintained pursuant to state law on a racially segregated basis; and

4) Whether from the evidence adduced at the hearing in the trial court below there was shown a systematic exclusion of Negroes from the grand jury which indicted the petitioners, Negro criminal defendants, they being thereby deprived of rights secured to them by the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

Statutes Involved

The statutes involved are the following sections of the Code of the State of Georgia (1933), as amended:

> 59-106. (816, 819 P.C.) Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.
>
> The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror,

such name shall be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1887, p. 31; 1892, p. 61; 1899, p. 44; 1953, Nov. Sess., pp. 284, 285; 1955, p. 247.)

92-6307. (1086) Entry on digest of names of colored persons.—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest. (Acts 1894, p. 31.)

Statement of the Case

1. Proceedings Below.

Petitioners, adult Negro men, were indicted by the Mitchell County, Georgia, Grand Jury (January Term, 1960) for the murder of James Eldridge "Peter" Glenn, an adult white man. Trial juries returned verdicts of guilty on January 13, 1960.

Petitioners subsequently filed unsuccessful motions for new trials, appeals to the Supreme Court of Georgia, and petitions for writs of certiorari in the Supreme Court of the United States. Questions relating to the racial composition of the grand and petit juries of Mitchell County, Georgia—except for a vague allusion in the petitions for writs of certiorari in the Supreme Court of the United States—were first raised in a petition for writ of habeas corpus in the United States District Court for the Southern District of Georgia. The petition was denied on the ground, among others, that a state remedy was available. The United States Court of Appeals for the Fifth Circuit affirmed. *Whitus* v. *Balkcom* (5 Cir., 1962), 299 F. 2d 844.

The Supreme Court, *per curiam,* vacated the judgment and remanded the case. *Whitus* v. *Balkcom,* 370 U.S. 728 (1962). Again the District Court dismissed the petition. On appeal, the Court of Appeals reversed, stating:

> [13] As in [U.S. ex rel.] Goldsby [v. Harpole, 263 F. 2d 71 (5 Cir. 1959), cert. den. 361 U.S. 838, 80 S.Ct. 58, 4 L. ed. 2d 78] and [U.S. ex rel.] Seals [v. Wiman, 304 F. 2d 53 (5 Cir. 1962), cert. den. 372 U.S. 975, 83 S.Ct. 741, 9 L. ed. 2d 729], the Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari, or otherwise, will be sufficient to afford the State an opportunity to take the necessary steps to reindict and retry the petitioners. Any such reindictment must of course be by a grand jury from which Negroes have not been systematically excluded, and any such retrial must be before a jury from which Negroes have not been systematically excluded, or before some court or tribunal so constituted as not to violate the petitioner's constitutional rights. For the guidance of the parties, the Court expresses the present opinion that if petitioners are reindicted and retried and if any question should arise as to the legality or constitutionality of such indictment or trial, that should be decided not upon the present petition but in the regular course by the Courts of the State of Georgia, subject to possible review by the Supreme Court of the United States. (*Whitus* v. *Balkcom* [5 Cir. 1964], 333 F. 2d 496, 510.)

Petitioners were reindicted by the Grand Jury of Mitchell County, Georgia, on April 12, 1965 (R. 5-6, 67-68). Prior to their indictment, however, and in accordance with

Georgia practice, Messrs. Whitus and Davis filed challenges to the array of grand jurors on the ground that the grand jury was, in fact, and by state law had to be, illegally and unconstitutionally composed and drawn and was in derogation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and that the proceedings before, and indictment by, the grand jury would deprive them of due process of law and equal protection of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States and by Article III, Section 2, and the Fifth, Sixth, and Seventh Amendments of said Constitution (R. 1-3, 69).

The Judge of the Superior Court of Mitchell County heard the evidence and arguments on April 16, 1965, and entered an order denying the challenges on April 19, 1965 (R. 7, 50). From that final judgment an appeal lay.

Petitioners' appeal to the Supreme Court of the State of Georgia was transferred to the Court of Appeals of Georgia for hearing, pursuant to the provisions of Section 24-4525 of the Code of Georgia (1933), as amended. There the judgment was affirmed on September 8, 1965 (R. 56-57). The Supreme Court of the State of Georgia denied certiorari on November 9, 1965 (R. 66).

2. Statement of the Facts.

In February, 1965, the six white members of the Mitchell County Jury Commission—there were no Negro commissioners (R. 29)—met to revise the jury lists (R. 27, 33). The commissioners had the tax digest and the old jury roll with them (R. 21, 27) both of which they used (R. 48).

Prior to 1965 tax returns were on different colored paper —yellow for Negroes, white for whites (R. 44, 45). They are still racially designated as are tax digests (R. 42).

Each commissioner testified he did not purposely exclude Negroes on the basis of their race (R. 26, 30, 36). They said racial designations on tax records did not influence them in their selections (R. 45, 47, 48). The 500 to 600 persons chosen (R. 32) were sought as the most intelligent, upright citizens of the community over 21 years of age (R. 30). But no intelligence tests were given them nor was their educational background a factor (R. 31). Indeed, a member of the jury commission could not describe the mechanics of selection (R. 24), the conversations of the commissioners (R. 22-23), or whether or not the old jury lists were used, although he thought they were (R. 25). After stating that he complied with constitutional requirements in the selection of jurors he didn't know what the requirements were (R. 25). Another commissioner had no idea of the number of Negroes on the rolls (R. 32).

Although only 3 of 90 jurors summoned were Negroes (R. 40) the 1960 *Census of Population,* Vol. I *Characteristics of the Population* part 12, Table 27, p. 12-123 discloses that 10,206 people over the age of 21 years reside in Mitchell County, Georgia of whom 4,706 were male, 2,004 (42%) of whom were Negroes.

Prior to the April Grand Jury which indicted Messrs. Whitus and Davis the three senior members of the Mitchell County Bar (R. 14, 17) could recall only 1 Negro on a grand jury and 2 Negroes on a petit jury list (R. 8-13, 14-15, 16-19). The first remembered Negro Mitchell County Grand Juror (1 Negro of 19 men) served in this case (R. 38, 39, 41).

ARGUMENT

I.

The Use of Tax Digests Containing Racial Designations as the Source for Names of Grand Jurors Provided the Opportunity for Discrimination Rendering the Indictments of Petitioners Unconstitutional.

1. History of the statutes involved.

It was from tax digests required to be racially segregated by Section 92-6307 of the Georgia Code that the names of grand jurors were selected. The progenitor of this section was enacted in December of 1894 as part of a Voters' Registration bill. The inherent design of the voter registration provision was disfranchisement of Negroes. A side effect, since jurors were selected from the same tax lists as those from which persons who had paid their taxes were qualified as electors, was the exclusion of Negroes from jury duty.

In one of the most plaintive of the appeals made to President Cleveland by distraught Southern Democrats, Governor William J. Northern of Georgia wrote in September, 1893, saying, "the conditions of this State are fearful and threatening" and are engendering "a lack of confidence in the party in power." His greatest fear was of the growing power of Populism. "Every election held in this State for the past three (3) months has gone against the Democrats and in favor of the Populists," he wrote. Woodward, C. Vann, *A History of the South, Origins of the New South,* IX, 1877-1913, L.S.U. Press, 1951, p. 273.

That the Populist movement was a full scale assault on the Democrats, heirs of the old Southern Bourbon Dynasty, is self evident.

"The political strategy of Southern Populists was based on combinations and alliances along regional, class, and racial lines—first, an alliance between South and West; second, a combination of farmers and city and factory laborers; and third, a political union with Negro farmers and laborers within the South. Every phase of this strategy was a challenge to the new-South system which had sought to divide all the elements Populists were trying to unite." *Ibid.*, p. 252.

"The bolder of them [i.e. Populists] challenged the cult of racism with the doctrine of common action among farmers and workers of both races. The very existence of the third party, was, of course, a challenge to the one-party system as well as to white solidarity." *Ibid.*, p. 249.

Even though the Populists had been defeated in the 1892 elections, their efforts through such men as Tom Watson were being renewed and their cause advanced.

"Tom Watson spoke during the summer of 1893 in thirty-five Georgia counties to crowds that he estimated to total 150,000 people." *Ibid.*, p. 273.

To meet the threat of a general Populist victory in the elections of 1894, the various Southern states took their separate steps.

"One refinement of old-party methods took the form of changes in election laws—usually described as reforms. The Sayre election law of Alabama, for example, prohibited assistance in marking ballots, thus providing means of disfranchising thousands of illiterate voters, white as well as black. (Clark, *Populism in Alabama,*

146; *Montgomery Advertiser,* August 10, 1894.) The Walton law, passed by the Democrats of the Virginia Legislature in 1893, likewise discriminated against the unlettered voter. (Sheldon, *Populism in the Old Dominion,* 106-108.) A new registration law adopted in Georgia the following year placed in the hands of a Democratic registration committee the power to draw up lists of qualified voters. The potentialities of this law were demonstrated in Richmond County, in Watson's district, where more than one third of the Negroes registered (almost as many as whites) were listed as 'just attained the age of 21.'" *Ibid.,* p. 275.

Prior to the elections of 1894

"the Democratic machine of Augusta, more desperate than in 1892, determined to win the congressional election in November, 1894, by any means possible. A description of the methods used—the drunken Negro repeaters, the ballot-box stuffing and burning, intimidation, bloodshed, and bribery—is unnecessary, for the scene was merely a repetition of that of 1892 on a more extensive scale; much more was required to defeat Watson in 1894." Woodward, C. Vann, *Tom Watson, Agrarian Rebel,* N.Y. The Macmillan Company, 1938, pp. 269-70.

The "much more" that Woodward speaks of was a court ruling that held registration unnecessary in congressional elections. The Populists sought, unsuccessfully, an injunction restraining unregistered voting. *Ibid.,* pp. 269-270.

Watson was defeated amid howls of "unfair" and "fixed". The Voter's Registration bill of 1894, the response to this

election, was a "final solution" to the problem of the Negro vote. It was but one of the last entries on the journal of white supremacy. Earlier, in June, 1890, Congressman Henry Cabot Lodge introduced a bill for Federal control of elections known popularly as the "Force bill." The South was outraged.

> "The Lodge bill caused more alarm and excitement in the South than any Federal measure since 1877. (For example, Charleston *News and Courier,* September 24, 1890; Jacksonville *Times-Union,* July 25, 1890; Atlanta *Constitution,* quoted in Richmond *State,* July 19, 1890; Jackson *Clarion-Ledger,* December 5, 1890.) 'Not for twenty years has the public mind been so much disturbed,' declared the Richmond *Dispatch* in a five-column, front page editorial on the subject! 'The South stood one reconstruction,' said a Mississippi paper, 'It remains to be seen whether it will meekly submit to another.' The Atlanta *Constitution* called for a revival of 'that glorious era' when 'the indomitable spirit of the freemen of Georgia was equal to the emergency . . . . what we did twenty years ago we can do again' (quoted in Richmond *State,* July 19, 1890). See also Richmond *Dispatch,* July 24, 1890; Jackson *Clarion-Ledger,* December 5, 1889." *Ibid.,* pp. 254-255.

The old party Democrats could, however, put the Force bill to good use.

> "The practical uses of the alarm over the Force bill were not lost on the old party. 'Its effect will be to draw the color line more intensely and to weld the South more solidly together,' observed a Richmond Democrat (Captain Sol Cuthens, in Richmond Dis-

> patch, July 24, 1890). 'But for the Force bill,' admitted a Democratic paper, 'the South might possibly have listened to the appeals of some of the new parties.' But so long 'as that bill threatens her with all the horrors of reconstruction days,' white solidarity was assured. *Ibid.*, October 8, 1892." *Ibid.*, p. 255.

The predecessor of § 92-6307 was the South's final reply to the Force bill, and its rhetoric harangued the Negro, the poor and the unlettered until it was repealed in part in 1966.

The racially designated tax digest when used with the subjective standards for jury selection established in Georgia Law—"upright and intelligent citizens . . . serve as jurors, . . . , the most experienced, intelligent and upright citizens . . . serve as grand jurors"—offers an almost foolproof system for legalizing racial discrimination.

Prior to the Civil War the names of jurors were furnished by the tax collector (Judiciary Act of 1799, Vol. 1, 292-294, Section XXXVIII). By 1861 names were selected from the books of the Tax Receiver by the justices of the Inferior Court of the Counties. Grand jurors were to be "able, discreet and qualified" (Code of Georgia 1861, Article 2, Section 3882, pp. 721-722).

In 1868 the requirement that jurors be "upright" and "intelligent" was placed in the state constitution (Constitution of the State of Georgia (1868), Article 5, Section XIII, 781, II). By 1877 jurors were required to be "the most experienced, intelligent and upright men" (Constitution of the State of Georgia (1877) (Article VI, Section XVIII 997 n, Georgia Acts 1878-9, p. 34). The 1877 convention had been concerned with Negro voting. Dr. Sam Small,

who reported the constitutional convention of 1877, put it succinctly in an address to the Georgia Bar Association in June of 1927. The convention's purpose was "so—to allocate the elective franchise as to secure white supremacy and yet not fall into conflict with the newly attached Negro suffrage amendments of the Federal Constitution in support of them" (Cooper, Walter G., *The Story of Georgia,* Vol. III, 1938, p. 259). For three decades prior to 1894 the mind of the white south was made up. It intended to deprive Negroes of their civil rights. By the year of adoption of the statute questioned here lynching of Negroes was reported weekly and often daily. Soon *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) would brand segregation upon the body politic. The statute in question was a part of that program.

2. Racial identification coupled with vague and subjective standards of juror selection affords an unconstitutional mechanism for racial discrimination.

The constitutionality of Section 92-6307 of the Georgia Code was upheld in *Brookins* v. *State,* 221 Ga. 181, 144 S.E. 2d 83, 89 (1965), the Supreme Court of Georgia stating:

> The fact that the names of Negroes were segregated from those of whites on the tax digests, and the fact that the names of female Negroes were not entitled "Miss" or "Mrs.", as were the names of white females do not show that the Negroes were added to or excluded from the jury lists solely because of their race.

The court decided that the evidence in its entirety did not warrant the conclusion that Negroes had been excluded from grand and petit juries on the basis of race.

But *Avery* v. *Georgia,* 345 U.S. 559, 562 (1952) condemned the opportunity to discriminate. As Mr. Chief Justice Vinson said:

> Even if white and yellow tickets were drawn from a jury box without discrimination, opportunity was available to resort to it in other stages of the selection process.

In Georgia the opportunity is still present. The yellow and white slips in *Avery* have at least a kissing kinship with yellow and white tax returns in Mitchell County. As *Avery* holds, the opportunity for discrimination, coupled with the history of exclusion of Negroes from the juries of certain counties, suffices here.

In *Avery* at p. 562, Mr. Justice Frankfurter, concurring, said: "We may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips were used." *Id.* at 564. Writing for the Court in *Williams* v. *Georgia,* 349 U.S. 375, 382 (1955), he concluded that, "it was the system of selection and resulting danger of abuse which was struck down in Avery and not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists."

Racial records and subjectively vague standards—"uprightness," "intelligence," "experience"—make discriminatory juror selection a near certainty. This Court is aware of the inherent vice of the parochial jury commissioner.

Discretion itself flies in the face of the selection for jury duty of a true cross-section of the population. Condemna-

tion of discretion in the hands of state voting officials is at the heart of *United States* v. *Mississippi,* 380 U.S. 128 (1965) and *Louisiana* v. *United States,* 380 U.S. 145 (1965). That same discretion coupled with racially separated lists should be even more forcefully condemned here (cf. *Smith* v. *Texas,* 311 U.S. 128 (1940)).

A state must not provide unnecessary "opportunities to discriminate." In *Anderson* v. *Martin,* 375 U.S. 399 (1964), this Court ended the racial designation on the ballot of all candidates for public office. There was, of course, no positive proof that these racial designations in any way influenced the voting patterns of Louisiana citizens. Nonetheless, the Court held that the designations were unconstitutional because the state was indicating that race was "an important—perhaps paramount—consideration" in a voter's choice. 375 U.S. 399, 402 (1964). The Court added that a state cannot "encourage its citizens to vote for a candidate solely on account of race. Cf. *Steele* v. *Louisville & N. R. Co.,* 323 U.S. 192, 203 (1944). And that which cannot be done by express statutory prohibition cannot be done by indirection." 375 U.S. 399, 404 (1964). In the jury situation it is clear that a state cannot encourage, or even permit, its jury commissioners to select juries on the basis of race. But the Georgia procedure both permits and encourages selection along racial lines.

This practice is the more reprehensible because it affects the appearance of fairness in the administration of justice, the "imperative of judicial integrity" [1] and this Court has held unconstitutional other burdens, similar to those imposed by Georgia, on Negro criminal defendants (cf. *Hamil-*

[1] *Mapp* v. *Ohio,* 367 U.S. 643, 659 n.53 (1961).

ton v. *Alabama,* 376 U.S. 650 (1964) and *Johnson* v. *Virginia,* 373 U.S. 61 (1963)).

While the practice of selecting juries from racially segregated tax lists has never been considered by the Supreme Court of the United States, the practice of using unsegregated tax lists has. In *Brown* v. *Allen,* 344 U.S. 443 (1952), and in *Speller* v. *Allen,* 344 U.S. 443, 477 (1952), the court held that the use of tax digests, silent as to designation of race, in the selection of jurors in Vance and Forsyth Counties, North Carolina, satisfied the requirements of "due process" and "equal protection" contained in the Fourteenth Amendment.[2]

There was no evidence presented, nor were any charges made, that the tax digests themselves contained any classification as to race as in the instant case, nor did the court consider the issue.

"Petitioner offered no evidence to support his charge of limitation against the jury service of Negroes, except the fact that fewer Negroes than whites, having regard for their proportion of the population, appeared on the jury panels." *Brown* v. *Allen, supra,* p. 467.

The practice of maintaining state records on a segregated basis has been passed upon by the Supreme Court of the United States. In the recent case of *Hamm* v. *Virginia*

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[2] Whether this practice would be upheld in a direct challenge based upon economic discrimination was excluded from the Court's consideration and is questionable. Cf.: *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Eskridge* v. *Washington,* 357 U.S. 214 (1958); *Lane* v. *Brown,* 372 U.S. 477 (1963); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Harvey* v. *Mississippi,* 340 F.2d 263 (1965). No such challenge is at issue here. See also *Harper* v. *Virginia State Board of Elections,* 34 L.W. 4305 (1966) and *Texas* v. *United States,* 34 L.W. 3376 (1966).

State Board of Elections, 230 F. Supp. 156 (E.D. Va. 1964), aff'd *per curiam sub nom. Tancil* v. *Woolls,* 379 U.S. 19 (1964), a three-judge District Court declared that Virginia statutes requiring that lists of voters and taxpayers be kept in separate books according to race violated the Fourteenth Amendment. The District Court stated that it was now axiomatic that no State can directly or casually promote a distinction in the treatment of persons solely on the basis of their color. To be within the condemnation, the governmental action need not effectuate segregation of facilities directly. Cf. *Anderson* v. *Martin,* 375 U.S. 399, 402 (1964). The result of the statute or policy must not tend to separate individuals by reason of difference in race or color. No form of state discrimination, no matter how subtle, is permissible under the guarantees of the Fourteenth Amendment. 230 F. Supp. at 157-158.

II.

Negroes Were, in Fact, Systematically Excluded From the Grand Jury Which Indicted Petitioners.

This Court has vigorously condemned the outright exclusion and mere token inclusion of Negroes on juries. See *Strauder* v. *West Virginia,* 100 U.S. 303 (1880) (Negroes prohibited by statute); *Neal* v. *Delaware,* 103 U.S. 370 (1881) (No Negroes for jury service); *Bush* v. *Kentucky,* 107 U.S. 110 (1883) (Negroes prohibited by statute); *Norris* v. *Alabama,* 294 U.S. 587 (1935) (No Negroes called within memory); *Hollins* v. *Oklahoma,* 295 U.S. 394 (1935) (No Negroes called for jury service); *Hale* v. *Kentucky,* 303 U.S. 613 (1938) (No Negroes called for 30 years); *Pierre* v. *Louisiana,* 306 U.S. 354 (1939) (One Negro called within memory); *Smith* v. *Texas,* 311 U.S. 128 (1940)

(Eighteen Negroes called in 7 years); *Hill* v. *Texas,* 316 U.S. 400 (1942) (No Negroes called for 16 years); *Patton* v. *Mississippi,* 332 U.S. 463 (1947) (Three Negroes called in 30 years); *Cassell* v. *Texas,* 339 U.S. 282 (1950) (Twenty-one Negroes served in 6 years); *Hernandez* v. *Texas,* 347 U.S. 475 (1954) (No Mexicans served for 25 years); *Reece* v. *Georgia,* 350 U.S. 85 (1955) (Six Negroes called in 18 years); *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958) (One Negro served in 18 years); *Arnold* v. *North Carolina,* 376 U.S. 773 (1964) (One Negro served in 24 years).

That the 6 white jury commissioners systematically excluded Negroes from the Grand Jury here is clear. Three of 90 jurors summoned were Negroes in a county where Negroes comprised 42 percent of the over age 21 male population. One Negro served on the grand jury, he apparently being the first Negro to so serve. The source of names was the segregated tax digest and the old jury list, a list already condemned for its racial exclusiveness.

The state offered no evidence of the number of Negroes eligible on tax rolls. The discrepancy was not explained by educational differences, economic distinctions, criminal records, a lack of intelligence, uprightness, or experience. No explanation at all was offered by the state. The commissioners merely said that they did not discriminate. This unsupported allegation has been held insufficient for rebuttal of a prima facie case. See *Norris* v. *Alabama, supra.* See also *Avery* v. *Georgia, supra,* which focused on opportunity to exclude rather than on exclusion or intention.

Here there was a history of exclusion coupled with actual exclusion. The convictions must be reversed.

III.

The Judgments Should Be Reversed and Rendered and the Petitioners Freed.

Since 1959 the petitioners have awaited trial. The United States Court of Appeals for the Fifth Circuit ruled that Georgia might reindict and retry petitioners by a jury from which Negroes had not been systematically excluded. *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964). This Georgia chose not to do. Ordinarily this Court will merely set aside a conviction providing a new trial. As this Court stated in *Hill* v. *Texas, supra* at 406:

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements . . . ."

Similar language is contained in *Patton* v. *Mississippi, supra* and *Eubanks* v. *Louisiana, supra.* And the Court of Appeals for the Fifth Circuit certainly had this in mind in its ruling in 1964. Georgia, not the petitioners, had the burden of providing fairly selected juries for the retrial. This Georgia did not do.

Justice in Mitchell County, Georgia is as white as the marble on a courthouse facade. This court knows of the "grisly 'Hobson's Choice'" (*Whitus* v. *Balkcom,* 333 F.2d 496, 499 (5th Cir. 1964)) much of the South provides a Negro criminal defendant on trial for his life.

The county courthouse has always been a seat of power in the South. Yesterday Negroes rarely went there. When they went there it was to pay taxes or purchase a license or be a witness or be tried. Tomorrow they may go there

to vote or serve on juries or, perhaps, to work, or practice law, or see a friend. But that tomorrow—like so many of the South's tomorrows—will never come if segregated justice continues. "The Deep South remains true to its heritage. The segregation of the machinery of justice, police, judges, courts and juries, remains. But really statistical evidence is unnecessary. One need only enter a southern courtroom to see discrimination at work." Lester, Anthony, *Justice in the American South,* Amnesty International, 1 Mitre Court Buildings Temple, London, E.C. 4 (1965), pp. 12-13.

All-white justice as it exists in sections of the South makes heroes of killers, rallying points of men accused of heinous crimes. Philadelphia and Jackson, Mississippi, law men and fertilizer salesmen, Selma and Birmingham Klansmen, bombers, burners, and sharpshooters strike terror in the hearts of Negro citizens seeking to free themselves from the vestiges of slavery.

Any consideration of the systematic exclusion of Negroes from juries requires recognition of the totality of the system of segregated justice. For an excellent contemporary review of segregated justice in the South see Nelson, Jack, "Jim Crow Justice," Los Angeles *Times,* June 13-17, 1965, p. 1 (a series of articles).

The law has been clear for 87 years but ". . . the problem of racial exclusion from jury service is relatively widespread and, in certain areas, deeply entrenched. The serious and continuing nature of the problem is revealed by the frequency of cases in which the issue of jury exclusion is raised and by local situations which the facts in those cases disclosed; by the plain statements of judges and offi-

cial observers; and by various field studies conducted by the Commission's staff." *Justice,* 1961 U.S. Comm. on Civil Rights Report, p. 90.

Courts technically rid the nation of legally enforced segregation in public education and public life. But racial segregation dies hard—as hard in courts as in schools. And litigation is by its nature slow, much slower than a march from Selma to Montgomery or a few weeks on the streets and sidewalks and in the jails of Birmingham.

Lawyers and judges know—or, at least hope—that the conflicts of men can be best settled in court. But it is their duty to make certain courts are open and fair—and above suspicion. In the Deep South, courts and the Bar have failed miserably but not irretrievably to perform their duties under the Constitution and to make state courts instruments for peaceful social change rather than repression. But who could expect the relatives and friends of Phil Whitus and Leon Davis to trust the law? And if they are ever asked either in the South or in some ne.. far away city to take their struggle out of the streets and into the courts, who can blame them for cynicism?

If, and when, juries in the South reflect the broad base required of them by the Constitution of the United States, the Negro lawyer in the South may find his practice includes the personal injury cases that now find their way to the white lawyer on the other side of town. Indeed, the racial political cavortings of white lawyers may become more subdued.

A moderate newspaperman may be able to editorialize on racial matters without fear of an all-white jury and a libel verdict in non-racial cases.

The Negro workman may find that his broken leg is as valuable to an insurance company or a jury as the broken leg of the white man who works by his side.

And most importantly the hundreds and thousands of Negro men and women who might have entered guilty pleas rather than exercise a "grisly 'Hobson's Choice'" may exercise their right to trial by jury.

Negro neighborhood crime rates may decline, for to Negro jurors the life and sanctity of the Negro neighborhood will be important.

Removal of civil rights cases from state courts will decline, for, as state courts become fair tribunals, they will be used by Negro people.

The working of the Federal system will be enhanced, for, by strengthening state courts—by making them fair—the doctrine of Federalism is itself strengthened. Courts no less than state legislatures are an instrumentality of states' rights—or wrongs. The jury system is the bulwark of liberty. It has been weakened in a proportion that equals, almost exactly, the extent to which it has been perverted by the exclusion from it of racial and other groups.

The freeing of these two defendants—and could they expect less for they have, after all, served 7 years in jail without a fair trial—would accord with the mandate of the Fifth Circuit. It could also move many Southern courts to eliminate racial discrimination in the administration of justice.

Conclusion

The judgment of the Court of Appeals of Georgia should be reversed and rendered with instructions that the petitioners be freed.

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